

**From:** Paul Frankenstein  
**To:** Microsoft ATR  
**Date:** 1/23/02 5:52pm  
**Subject:** The Microsoft Settlement

I would like to comment briefly on the Proposed Final Judgment in the US. v. Microsoft case.

There are a number of significant flaws in the PFJ as it currently stands, but I wish to focus on a few key issues:

1) The conduct of Microsoft during the trial:

Microsoft and its attorneys repeatedly falsified evidence that was presented in court. The most egregious example was a faked videotape that Microsoft claimed showed how Windows 98 was impaired by the removal of Internet Explorer. In fact, Windows 98 is not impaired by such removal; yet rather than admit that to the court, Microsoft chose to not only lie, but to present evidence that they knew had been faked. Subsequently, they produced another videotape that purported to show that Windows 98 was faster than Windows 3.1 at accessing the internet; however, the machine running Windows 98 had been equipped with a faster modem.

Microsoft employees and executives were repeatedly evasive and deliberately misleading while giving testimony, often contradicting their own email evidence. This culminated in the videotaped deposition given by Bill Gates, where he was evasive to the point of asking for definitions of the words "concern," "complete," and "we."

2) The PFJ completely fails to prohibit the kind of anticompetitive behavior (specifically the elimination of Netscape as a competitor to Microsoft, and more broadly the elimination of the browser as an operating system-independent platform) that formed the original basis for U.S. v. Microsoft.

3) The whole investigation came about when it was discovered that Microsoft was not complying with the terms of the 1994 consent decree.

4) The PFJ has no effective enforcement mechanism whatsoever.

5) Given the history of the case and the absence of an effective enforcement mechanism, there is ample evidence to suggest that Microsoft will, once the PFJ is signed, ignore the terms of the PJF and continue with their unlawful anticompetitive behaviors and practices.

Unfortunately, Microsoft continues in attempting to ignore the will of the courts; their recent attempt to settle a number of class-action lawsuits involved donating \$1 billion of software and hardware to schools across the nation. Unfortunately, such a settlement had nothing to do with the merits

of the case and simply would have extended Microsoft's reach into a market where they have not been traditionally successful. Judge Motz correctly ruled that the proposed settlement in that case was actually beneficial to Microsoft and not beneficial to the plaintiffs.

I believe that the PFJ, as currently written, fails to provide an appropriate remedy for Microsoft's actions, as laid out in Judge Jackson's Findings of Fact, and, in fact, has the potential to actually be beneficial to Microsoft. Moreover, it utterly fails to address the question of the public good -- unless one believes that monopolies, anti-competitive behavior, and predatory pricing practices are in the public good.

Sincerely,

paul frankenstein